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U.S. Bankruptcy Appellate Panel of the Tenth Circuit

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Barbara A. Schermerhorn Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE LOLA FAYE DENTON, also known as Faye Denton, Debtor.	BAP No. WO-98-084
IN RE BEAR CREEK WILDLIFE, INC., Debtor.	
LOLA FAYE DENTON, BEAR CREEK WILDLIFE, INC., and THELMA PATTERSON, Appellants, v. KENNETH L. SPEARS, Trustee, Appellee.	Bankr. No. 93-11217 Chapter 7 Bankr. No. 93-11685 Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before BOULDEN, MATHESON, and KRIEGER,[1] Bankruptcy Judges.

BOULDEN, Bankruptcy Judge.

The issues in this appeal are a continuum of a longstanding conflict that

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

[1] Honorable Marcia S. Krieger, United States Bankruptcy Judge, United States Bankruptcy Court for the District of Colorado, sitting by designation.

predates the Debtors' Chapter 7 cases. The appeal is filed by Lola Faye Denton (Denton), and her company Bearcreek Wildlife, Inc. (collectively the Debtors), and Denton's mother Thelma Patterson (Patterson) (collectively the Appellants). The Appellants filed a Motion to Remove Trustee (Removal Motion) alleging that Kenneth L. Spears, the Chapter 7 trustee of the Debtors' estates (Trustee), was biased and not disinterested. The Removal Motion asserted, in part, that the Trustee should be removed as a result of his relationship with an attorney who has represented parties averse to the Appellants, including Denton's ex-husband. The Debtors also filed a Motion to Compel Trustee's Performance seeking turnover of a third party's financial statement (Performance Motion). In a brief order reciting the contentious tenor of the cases but containing no findings, the bankruptcy court denied both motions without a hearing (Order).[2]

For the reasons set forth below, the portion of the Order that relates to the Removal Motion is REVERSED and the cases are REMANDED for further proceedings. The appeal of the portion of the Order that relates to the Performance Motion is DISMISSED for lack of appellate jurisdiction.

I. APPELLATE JURISDICTION

This Court, with the consent of the parties, has jurisdiction to hear timely-filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit. 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002. Upon leave of court, the Court also has jurisdiction to hear appeals from interlocutory orders. *Id.* at § 158(a)(3), (b)(1), and (c)(1).

The Appellants timely filed this appeal and have not opted out pursuant to 28 U.S.C. § 158(c). Fed. R. Bankr. P. 8001; 10th Cir. BAP L.R. 8001-1. The parties also assume that the Order appealed is "final" because the Appellants

[2] In the Order, the bankruptcy court resolved other motions. These rulings have not been raised as issues in this appeal and are therefore waived. *See, e.g., State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 984 n.7 (10th Cir. 1994).

have not moved for leave to appeal, and the Appellee has not raised the issue of lack of jurisdiction. *See* 28 U.S.C. § 158(a)(3); Fed. R. Bankr. P. 8003 and 8011; 10th Cir. BAP L.R. 8011-1.

After reviewing our jurisdiction over this appeal, *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986) (federal appellate court must satisfy itself that it has jurisdiction over appeal even if conceded by the parties); *accord, Spears v. United States Trustee*, 26 F.3d 1023, 1024 (10th Cir. 1994), we conclude that we have jurisdiction over the portion of the Order related to the Removal Motion because it "'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)); *see, e.g., In re Schultz Mfg. Fabricating Co.*, 956 F.2d 686, 691-2 (7th Cir. 1991) (court assumed that order denying motion to remove Chapter 7 trustee was final); *In re BH&P, Inc.*, 949 F.2d 1300, 1306 (3rd Cir. 1991) (order removing Chapter 7 trustee was final); *cf. Richman v. Straley*, 48 F.3d 1139, 1143 (10th Cir. 1995) (court assumed that appeal from order claimed to be a *de facto* removal of a standing Chapter 13 trustee in violation of § 324(a) was a final order).

The portion of the Order denying the Performance Motion, however, is not an order considered final and subject to appeal under 28 U.S.C. § 158(a)(1), or an interlocutory order for which leave to appeal is appropriate under 28 U.S.C. § 158(a)(3). The Appellants argue that the bankruptcy court erred in denying the portion of the Performance Motion that requested that the Trustee turnover a third party's financial statements to them in a matter referred to as the "§ 105 motion." The appeal of the Order related to the Performance Motion is analogous to an appeal of an order denying a motion for production of documents. It is well-settled that discovery orders are non-appealable

interlocutory orders. *See, e.g., Boughton v. Cotter Corp.*, 10 F.3d 746, 749-50 (10th Cir. 1993); *Joseph v. Lindsey (In re Lindsey)*, 212 B.R. 373, 374 (10th Cir. BAP 1997) (per curiam) (citing cases). Leave to appeal the Order related to the Performance Motion under § 158(a)(3) is not appropriate. We dismiss the appeal as it relates to the Performance Motion for lack of appellate jurisdiction.

II. BACKGROUND

After each of the Debtors filed a Chapter 11 case in 1993, their cases were ordered jointly administered. The cases were then converted to Chapter 7, and the Trustee was appointed as trustee of the jointly administered estates. Patterson, Denton's mother, is the trustee of a trust of which Denton is the beneficiary. The Trustee has sued Patterson in an effort to recover assets for the Debtors' estates, but has failed to pursue other assets of the estate to the Appellants' satisfaction.

The Debtors filed the Removal Motion in September 1998, asserting the following eight circumstances that require the Trustee's removal: (1) he is not disinterested and/or has a conflict of interest that is detrimental to his administration of the Debtors' estates, (2) he has failed to administer certain assets of the estate properly or diligently, (3) he employed B.J. Brockett, the Trustee's alleged former law partner whom the Appellants contend has a bias against them, as special counsel to pursue an action against Patterson and Denton, (4) he refused to furnish information related to the financial situation of one of the estates' debtors, (5) he did not provide the Appellants with notice of a fee application, (6) he failed to make interim reports every 180 days as required under the bankruptcy court's local rules, (7) his appointment was of questionable merit, and (8) he is no longer needed because the Debtors' estates have been fully administered. Patterson joined in the Removal Motion.

The Debtors sought a hearing on the Removal Motion, but the bankruptcy

court denied the request. Instead, the bankruptcy court entered the Order which reads, in relevant part, as follows:

> This case, filed in 1993, has a long and sordid past which includes allegations and recriminations that have existed over a period of several years and pre-date the filing of this case. As a result of having presided over many long and torturous hearings while this case has languished in this Court, the Court is well aware of the many strong personal animosities that existed previously and have only intensified during the course of these proceedings. The current pleadings are but a continuation of what has become the norm in this case.
>
> After a thorough review of the pleadings, the Court has determined that a hearing on the matters here in issue is not necessary nor would it be beneficial. The Court is prepared to rule as follows:
>
> Debtors and Thelma Patterson's Motion to Remove Trustee . . . should be and [is] hereby denied.

Appellants' Appendix, pp. 2-3. This appeal followed.

III. DISCUSSION

We apply the following rule in reviewing bankruptcy court decisions:

> For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for "abuse of discretion").

Pierce v. Underwood, 487 U.S. 552, 558 (1988). Thus, in reviewing the Order appealed, we must determine whether the bankruptcy court's factual findings were clearly erroneous, whether, upon *de novo* review, the correct law was applied, and then given those facts and the law, whether the bankruptcy court abused its discretion in refusing to remove the Trustee under 11 U.S.C. § 324(a) for cause. *BH&P*, 949 F.2d at 1313 (removal of a trustee is a matter committed to the sound discretion of the bankruptcy court); *see also In re Woods*, 173 F.3d 770 (10th Cir. 1999) (a for cause standard is reviewed for abuse of discretion) (citing *Nintendo Co. v. Patten (In re Alpex Computer Corp.*), 71 F.3d 353, 356 (10th Cir. 1995)); *accord State Bank of Southern Utah v. Gledhill (In re Gledhill)*, 76 F.3d 1070, 1085 (10th Cir. 1996).

Our review of the Order is hampered because the bankruptcy court failed to

make any findings of fact or conclusions of law supported by a record as required under Fed. R. Bank. P. 7052. *See* Fed. R. Bankr. P. 9014 (making Fed. R. Bankr. P. 7052 applicable in contested matters); *Featherstone v. Barash*, 345 F.2d 246, 249 (10th Cir. 1965) (the purposes of Fed. R. Civ. P. 52 are to aid the appellate court by affording it a clear understanding of the ground or basis of the decision of the trial court, to make definite what is decided in order to apply the doctrines of estoppel and res judicata to future cases, and to evoke care on the part of the trial judge in considering and adjudicating the facts in dispute.), *quoted in Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1373 (10th Cir. 1996); *In re Kopexa Realty Venture Co.*, 213 B.R. 1020, 1023-24 (10th Cir. BAP 1997). We recognize that the bankruptcy court has presided over many hearings over the course of these cases, and that the allegations supporting the grounds for removal may be, as reflected in the Order, simply the product of personal animosities with no basis in fact. But, with the record before us, we are simply unable to determine the basis upon which the bankruptcy court concluded the allegations in the Removal Motion are unfounded. As such, it is impossible for this Court to conduct an effective review of the Order.

IV. CONCLUSION

For the reasons stated herein, the Order as it relates to the Removal Motion is REVERSED and the matter is REMANDED to allow the bankruptcy court to enter findings of fact and conclusions of law supported by a record. The appeal of the Order as it relates to the Performance Motion is DISMISSED for lack of appellate jurisdiction.